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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

1348

JOHNNY RAY LITTLEPAGE

versus

UNITED STATES OF AMERICA

PETITION FOR

WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ____ Misc.

JOHNNY RAY LITTLEPAGE,
Petitioner,

versus

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on December 22, 1970.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this cause, styled United States v. Littlepage, No. 28,586, in said court,

is not as yet reported in a bound volume. A copy of the 'slip opinion' of said Court, as well as notification of the overruling of Petitioner's Petition for Rehearing without written opinion, is contained herein as Appendix "A".

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered in this cause on December 22, 1970. A Petition for Rehearing was overruled without written opinion on January 15, 1971. On February 5, 1971, the United States Court of Appeals for the Fifth Circuit granted Petitioner's Motion for Stay of Mandate was granted, the mandate being stayed to February 14, 1971, for purposes of filing this Petition for Writ of Certiorari. See Appendix "B".

Jurisdiction is invoked under 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the admission into evidence of an oral statement allegedly made by the petitioner constitute a violation of his rights under Amendments IV, V and VI, United States Constitution?

2. Did the admission into evidence of the fruits of a search of an automobile constitute a violation of the petitioner's rights under Amendments IV and V, United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Fifth Amendment:

"No person . . . shall be compelled in any criminal case to be a witness against himself."

United States Constitution, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Sometime during June, 1968, prior to June 7, 1968, Dallas police officer Michael Ringley, while on routine patrol, arrested Ronnie Tew for a traffic offense while Mr. Tew was operating the Petitioner's automobile. A subsequent search of the automobile uncovered certain wigs determined to have been stolen while moving in interstate commerce. This information was relayed to FBI agents in Dallas, Texas. Acting upon such information, FBI agents Holloman and Sloan went to the home of the Petitioner on June 7, 1968, between 9:00 and 9"30 AM. They knocked on the door of Petitioner's home, and Petitioner's wife answered the door. Upon learning the identity and purpose of the agents, she went upstairs and awakened the Petitioner who came to the door and admitted the agents to his home, having been advised by the agents that they sought answers to some

questions concerning stolen color television sets and George McGann, which matters Petitioner had previously discussed with FBI agents. Upon entry, the agents displayed what was represented to be a waiver of rights form. Petitioner acknowledged being advised of certain rights, and admitted signing some form at such time. (The specific form which the Petitioner signed was never admitted into evidence). Some ten or fifteen minutes after Petitioner had signed the form and had answered questions concerning George McGann and the color television sets, one of the agents broached the subject of Ronnie Tew and stolen wigs. According to the agents, at this juncture the Petitioner admitted possessing certain wigs which he further admitted he knew had been stolen at the time he received them from a third person.

The Petitioner's oral statements were admitted into evidence, over Petitioner's objection, and constituted the only evidence showing the Petitioner's knowledge that the wigs which he possessed were stolen.

The testimony relating to the arrest of Ronnie Tew and the discovery of the wigs in the automobile driven by Tew was admitted into evidence without objection by Petitioner.

Both of the questions here presented for review were raised by Petitioner in his brief before the United States Court of Appeals for the Fifth Circuit, and determined by that Court adversely to Petitioner.

BASIS FOR FEDERAL JURISDICTION IN TRIAL COURT

Petitioner was tried in the United States District Court for the Northern

District of Texas, Sarah T. Hughes, J., upon an indictment charging the Petitioner with possession of goods taken from interstate commerce, a violation of 18 U.S.C., Sec. 659.

ARGUMENT

THE INTERROGATION WHICH LED TO THE PETITIONER'S ORAL ADMISSION WAS CONDUCTED AT A TIME WHEN THE PROTECTIONS OF MIRANDA V. ARIZONA, 384 U.S. 436, WERE REQUIRED BUT WERE NOT FULFILLED.

The agents who interrogated the Petitioner, and who received the Petitioner's incriminating admissions, sought out the Petitioner only after they knew of his implication in the case as the result of the Dallas police arrest of Ronnie Tew and the discovery of the wigs in the automobile. Thus, when the interrogation in question took place, the agents had passed the investigatory stage of proceedings insofar as the Petitioner was concerned. The interrogation conducted at the Petitioner's house manifestly lent itself to eliciting incriminating statements. Under both the 'focus' test set out in Escobedo v. Illinois, 378 U.S. 478, and the 'accusatory' test of Miranda, at the time of the interrogation the Petitioner was entitled to the full protections required by Miranda. See Fisher v. Scafati, D.C. Mass. 1970, 314 F. Supp. 929, for an illuminating discussion of the test of Miranda's applicability.

The mere fact that the interrogation resulting in the damaging admission occurred in the 'familiar surroundings' of the Petitioner's home does

not remove this case from Miranda's holding. Whenever an individual is "deprived of his freedom of action in any significant way", Miranda applies. Orozco v. Texas, 394 U. S. 324; Mathis v. United States, 391 U. S. 1. In this case, after the agents made known to the Petitioner their knowledge of Ronnie Tew and the wigs, the Petitioner was compelled to respond to the agents' questioning for he could hardly refuse to answer questions put to him which he knew the agents already knew the answers to. This psychological coercion deprived the Petitioner of his freedom to act; that the deprivation was significant is borne out by the fact that the Petitioner made the damaging admissions attributed to him, a course of conduct not usually associated with a person acting under a free will and rational intellect. See Westover v. United States, 384 U. S. 436, at 496; Harrison v. United States, 392 U. S. 219; United States v. Pierce, 4 Cir. 1968, 397 F. 2d 128.

Under these circumstances, the Petitioner was entitled to the full Miranda warnings. The insufficiency of the warning administered to the Petitioner by the agents lies in their failure to make it "unmistakably clear" to him that he was entitled to have a court-appointed attorney with him during the interrogation to consult with him prior to answering any question. See Commonwealth v. Taper, Pa. Sup. Ct. 1968, 253 A. 2d 90. In the case at bar, this warning was not given.

> "Q. (By the prosecutor) They did tell you that this lawyer that would be appointed could be present during any interrogation and you could consult with your lawyer prior to answering any question if you desired, is that correct? (Emphasis added)
>
> A. (The Petitioner) I understood that."

This portion of the warning which the Petitioner acknowledged failed to satisfy Miranda because it was not made unmistakably clear to the Petitioner that a court-appointed attorney would be available to him during any interrogation, the use of the word "your" indicating that only an attorney of his choice could be available to him at such time. Atwell v. United States, 5 Cir. 1968, 398 F. 2d 507; Lathers v. United States, 5 Cir. 1968, 396 F. 2d 524; Chambers v. United States, 5 Cir. 1968, 391 F. 2d 455; Windsor v. United States, 5 Cir. 1968, 389 F. 2d 530; Fendley v. United States, 5 Cir. 1967, 384 F. 2d 923.

> "In order to fully apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with a lawyer , but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one." Miranda, 384 U.S., at 473 (Emphasis added)

THE PETITIONER'S INCRIMINATING ADMISSION WAS OBTAINED THROUGH DECEIT AND TRICKERY SO THAT THE WARNING GIVEN THE PETITIONER, WITHOUT REGARD TO ITS VALIDITY, WAS INAPPLICABLE AS TO THE OFFENSE ABOUT WHICH THE QUESTIONING WHICH LED TO THE ADMISSION WAS CONCERNED.

The FBI agents gained admission to the Petitioner's home, and secured his consent to interrogation, upon the representation by the agents that they sought answers to questions concerning color television sets and George

McGann. Only after ten or fifteen minutes of interrogation regarding these subject matters (about which the Petitioner had freely responded to FBI agents in the past) did the FBI agents broach the subject of Ronnie Tew and the stolen wigs. The warnings had been given in conjunction with the initial statement made by the agents - that their purpose was to secure answers to the television/ George McGann investigation.

As outlined in Miranda, 384 U.S., at 448 through 457, interrogating authorities are generally well trained to use trickery to place the subject at a psychological disadvantage, robbing him of his will to rely upon his constitutional rights. Here, the agents explicitly advised the Petitioner of his rights and specifically emphasized that they sought answers to an investigation in which the Petitioner had theretofore voluntarily cooperated. After lulling the Petitioner into forgetting any warnings and any rights by questioning him about the television sets and George McGann, a sharp, incisive and decisive question is asked concerning the wigs and Ronnie Tew. Once caught off guard, the Petitioner is hard put to interrupt the flow of communication which had preceded such question and absent any punctuation of the interrogation by the giving of warnings concerning the new line of questioning, the Petitioner is psychologically compelled to respond. The answer to the first question suffices to incriminate the Petitioner, and thereafter refusals to respond become futile since the Petitioner knows the agents have all the answers to their questions before the questions are asked. The answer to the first question - whether or not the Petitioner knew Ronnie Tew, to which the Petitioner replied that he knew he was in jail on the wig case - paved the

path which led only to the incriminatory statement because the cat was let out of the bag with the very first response, and the Petitioner was in no position to ever get the cat back in the bag.

Where authorities seek answers to numerous crimes, and the interrogation of an accused is conducted in the manner here presented, it is incumbent that warnings be given with respect to each portion of the entire interrogation which is individually devoted by the interrogators to a specific offense. Commonwealth v. McKenna, Mass. Sup. Jud. Ct. 1969, 244 N. E. 2d 560; and see Judge Kerner's dissent in Davis v. Burke, 7 Cir. 1969, 408 F. 2d 779; and Pea v. United States, D. C. Cir. 1967, 397 F. 2d 627.

THE ALLEGED WAIVER OF THE PETITIONER'S RIGHT TO COUNSEL WAS INVOLUNTARY BECAUSE OF THE PSYCHOLOGICAL COERCION INHERENT IN THE QUESTIONING WHICH COMPELLED THE ANSWERS PETITIONER ALLEGEDLY GAVE WITHOUT AFFORDING THE PETITIONER AN OPPORTUNITY TO EXERCISE HIS FREE WILL AND A RATIONAL INTELLECT.

Assuming the warning given was required and was complete, and assuming it was applicable to the questioning regarding the wigs and Ronnie Tew, it becomes necessary to determine whether the Petitioner validly waived his right to counsel.

This Honorable Court has always set high standards of proof for the waiver of Constitutional rights. Miranda, supra; Johnson v. Zerbst, 304 U. S. 458. The waiver of constitutional rights will not be "lightly inferred" and the courts will "indulge every reasonable presumption against (the) waiver of fundamental Constitutional rights." Johnson v. Zerbst, supra. The 'waiver'

referred to may be defined as "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, supra.

It is now clear that the right to counsel may be waived only if the waiver is knowingly, voluntarily and intelligently made. Walker v. Johnston, 312 U. S. 275; Adams v. United States ex rel. McCann, 317 U. S. 269; Carnley v. Cochran, 369 U. S. 506; Walton v. Arkansas, 371 U. S. 28; And once made, waivers are said to be viewed with mistrust and suspicion. Von Moltke v. Gillies, 332 U. S. 708.

In view of the circumstances in this case, it cannot be indisputably said that the Petitioner waived his right to counsel with respect to the interrogation concerning the wigs and Ronnie Tew, for at the time when the Petitioner executed a waiver of his right to counsel, he had been led to believe that the scope of the interrogation would concern only the color television sets and George McGann. Surely the record supports the proposition that the Petitioner would waive his right to counsel where the scope of the proposed interrogation covers matters which the Petitioner had previously discussed with FBI agents. However, the record is silent as to what the Petitioner would have done had the agents properly warned him of his rights when they commenced their interrogation concerning the wigs, or had they advised him of his rights along with a proposed scope of their interrogation which included questions about the wigs.

The interrogation conducted by the agents in this case is a classic example of interrogation technique as described in Miranda, 384 U. S., at 448 through 457. The interrogation was psychologically oriented, conducted

by two FBI agents with the Petitioner being alone. To secure the maximum impact when the subject of wigs was broached, the Petitioner was lulled into unconcern about wigs by ten to fifteen minutes of questioning concerning matters unrelated to the wigs. The first question - whether Petitioner knew anything about Ronnie Tew and wigs found in his automobile - posited the guilt of Petitioner as a fact well known to the agents. At this point, with the guilt of Petitioner (as a possessor of the wigs) being made known to all three persons, the two agents and the Petitioner, the Petitioner had no alternative but to admit to the damaging facts which the agents already knew, and which they advised the Petitioner they already knew.

> "The FBI agent entered the fray armed with defendant's earlier admission to the Williamson police, and it is most probable that defendant was aware of this fact. Defendant's knowledge of this fact coupled with the agent's warning conveyed the idea that though defendant could remain silent if he wished, he might as well answer the questions put to him, since the agent was already aware of the earlier answers. The decision to respond under such circumstances hardly can be termed voluntary." Harney v. United States, 5Cir. 1969, 407 F.2d 586, citing Westover v. United States, supra.

The Petitioner's will to either resist, or to exercise rights not fresh in his mind, was overborne by the revelation of the agents regarding their knowledge of his complicity in the case, and vitiates any explicit waiver made prior to the initial interrogation or any implicit waiver assumed because of the Petitioner's answer to the agents' questions concerning the wigs. See Harrison v. United States, supra; Gilpin v. United States, 5Cir. 1969, 415 F.2d 638.

PETITIONER'S ORAL ADMISSION WAS THE FRUIT OF AN ILLEGAL SEARCH AND SEIZURE AND THUS INADMISSIBLE.

Although no objection to the search of the automobile, and the seizure

of the wigs was made at the trial, Petitioner is not precluded from raising the issue at this time because (1) the issue was considered by the United States Court of Appeals for the Fifth Circuit in Petitioner's appeal, ostensibly under Garza-Fuentes v. United States, 5 Cir. 1968, 400 F. 2d 219; Alexander v. United States, 5 Cir. 1968, 390 F. 2d 101; and Rule 52 (b), F. R. Crim. Proc., and (2) the facts relating to the search and seizure in question were clearly raised at the trial, so that they are available for full consideration, and an objection to the search and seizure at the trial would be unnecessary as a predicate for raising the issue of the validity of Petitioner's statement as being a fruit of such search and seizure.

Petitioner's right to challenge the search and seizure is sustained by Jones v. United States, 362 U. S. 257. See also Velasquez v. Rhay, 9 Cir. 1969, 408 F. 2d 9.

The search involved was made pursuant to an arrest for a traffic offense, a crime which has no fruits or instrumentalities. Under applicable local decisions, the search and seizure was unconstitutional. Grundstrom v. Beto, D. C. Tex. 1967, 273 F. Supp. 912, affd Texas v. Grundstrom, 5 Cir. 1968, 404 F. 2d 644; Amador-Gonzales v. United States, 5 Cir. 1968, 391 F. 2d 308.

The Government failed to introduce a warrant authorizing the search and failed to adduce sufficient facts to establish constitutional probable cause authorizing a warrantless search. Texas v. Grundstrom, supra; Barnett v. United States, 5 Cir. 1967, 384 F. 2d 848.

In order to authorize a warrantless search of a vehicle, and seizure of

its contents, the searching officer must have reasonable grounds to believe that the contents of the automobile offend against the laws. Preston v. United States, 376 U. S. 364; Carroll v. United States, 267 U. S. 132. The record fails to establish probable cause because the record is silent as to the belief which the searching officer harbored prompting his search. Since the arrest of Tew was not for an offense of the character of robbery, and since there is no testimony that the officer who arrested Tew had reason to suspect a search of the automobile was necessary to insure his safety, the search in this case does not fall within the category of automobile searches authorized by Chambers v. Maroney, 399 U. S. 42.

In short, the record indicates an exploratory search incidental to a traffic arrest, of the type condemned by Judge Taylor in United States v. God Allahazar Allah aka Thomas Walker, D. C. Tex. 1969, No. CR-NO-3-1617-C, Order to Suppress entered September 9, 1969, a copy of which is attached hereto as Appendix "C".

The invalidity of the search being firmly fixed, the fruits of the search, be they tangible or testimonial, are rendered inadmissible. Wong Sun v. United States, 371 U. S. 471. In this case, the recovery of the wigs from the automobile led directly to the Petitioner, and once the Petitioner had been advised that the agents were aware of Tew's arrest, the recovery of the wigs from the car, and the connection between the automobile and the Petitioner, the nexus between the search and the statement which the Petitioner gave was established. But for the recovery of the wigs as the result of the illegal search and seizure, Petitioner's statement would, in all probability, not have been given. The statement is thus the fruit of the illegal search, and the taint of the search is

visited upon the statement. See Takahashi v. United States, 9 Cir. 1944, 143 F. 2d 118. As such, the statement was inadmissible. Wong Sun v. United States, supra; Silverthorne Lumber Co. Inc. v. United States, 251 U. S. 385.

CONCLUSION

The interrogation of Petitioner which culminated in the damaging statement contains all the salient features of Miranda: incommunicado interrogation of an individual subjected to psychological coercion and trickery, in a police dominated atmosphere without a full warning of Constitutional rights.

Even though the warning given in this case was closer to the requirements of Miranda than many warnings are, the nature and circumstances of the interrogation were such that the Petitioner was unable to exercise a free will and rational intellect so that he could be held to have validly waived his right to counsel.

The oral statement, without which the Government would have failed to present a sufficient case to sustain a conviction, was the fruit of an illegal search and seizure, and thus rendered inadmissible.

The admission into evidence of the oral statement violated the Petitioner's rights secured under the Fourth, Fifth and Sixth Amendment to the United States Constitution for the reasons pointed out above.

THE SEARCH OF THE AUTOMOBILE WHICH LED TO THE RECOVERY OF THE WIGS WAS CONDUCTED IN VIOLATION OF THE FOURTH AMENDMENT, AND THE ADMISSION INTO EVIDENCE OF TESTIMONY CONCERN-

ING THE SEARCH OF THE AUTOMOBILE AND SEIZURE OF THE WIGS SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE.

As detailed at pages 11 through 14, infra, the search of the automobile leading to the recovery of the wigs was an illegal search and seizure under Amendment IV, United States Constitution.

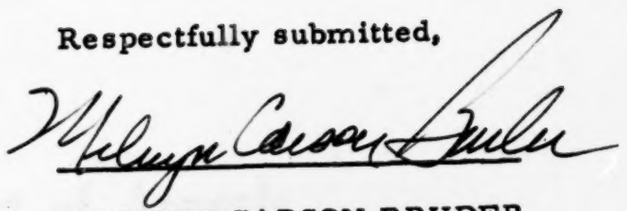
Admission into evidence of testimony concerning the same was error under Silverthorne, which prohibits the use of testimony concerning illegal searches and seizures as well as the admission of physical evidence seized. The testimony of Dallas police officer Michael Ringley, concerning the facts of the arrest of Ronnie Tew, the subsequent search of the automobile and recovery of the wigs, and his testimony that the wigs previously introduced in evidence (possession of which formed the basis of the offense of which the Petitioner was convicted) were similar to those which he found in the trunk of the automobile should not have been admitted into evidence.

The Petitioner's failure to object to this testimony at the trial does not preclude his raising this contention at this time for the reasons stated at page 12, infra.

PRAYER

Petitioner respectfully prays this Honorable Court grant this Petition and, if a hearing be necessary for disposition of this case, that upon such hearing the Writ issue and Petitioner's case be reversed and disposed of in accordance with law.

Respectfully submitted,



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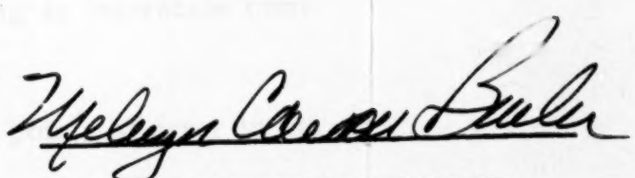
CERTIFICATE OF SERVICE

I, Melvyn Carson Bruder, Counsel for Petitioner, hereby certify that on the 12th day of February, 1971, I transmitted three (3) copies of this Petition for Writ of Certiorari to the Solicitor General, Department of Justice, Washington, D. C., 20530, via United States mail, air mail delivery, with postage pre-paid, and that on the same day I personally delivered to the United States Attorney's Office, United States Courthouse, Dallas, Texas, three copies of this Petitioner for Writ of Certiorari, in conformity to Rules 21(1) and 33, Rules of the Supreme Court of the United States.



MELVYN CARSON BRUDER

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28586

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHNNY RAY LITTLEPAGE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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(December 22, 1970)

Before TUTTLE, THORNBERRY and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: Appellant, Johnny Ray Littlepage, here appeals from his conviction upon a jury verdict of guilty of possession of goods or chattels in excess of $100, knowing the same to have been embezzled or stolen while moving in interstate commerce. 18 U.S.C. § 659.

Appellant asserts the following points of error in his

trial in the court below: (1) the overruling of defendant's motion to suppress and admission into evidence of his allegedly involuntary inculpatory oral statement; (2) failure of the trial court, after an evidentiary hearing, to make findings of fact relating to the voluntariness of defendant's statement; (3) the introduction into evidence of fruits of an illegal search and seizure; and (4) the impeachment of a material defense witness.

The evidence adduced at the defendant's trial established the theft of 214 wigs while the wigs were moving in interstate commerce. In the course of investigating the theft, two F.B.I. Agents went to defendant's home and upon questioning, he allegedly admitted that he knew the wigs were stolen prior to purchasing them, having been apprised of that fact by the seller. It is this admission of knowledge which the defendant sought to have excluded from evidence by way of a pre-trial motion to suppress.

In compliance with the requirements of *Jackson v. Denno*, 378 U.S. 368 (1964), the trial court ordered an evidentiary hearing, without the presence of the jury, to determine the voluntariness, *vel non*, of the defendant's oral statement. From that evidentiary hearing, the following facts appear.

Agents Sloan and Holloman of the F.B.I. arrived at the defendant's apartment between 9:00 and 9:30 A.M. Defendant's wife answered the door and the agents asked to see Mr. Littlepage. The defendant's wife went upstairs and awakened him and he subsequently came

to the door. Sloan and Holloman identified themselves as Special Agents of the F.B.I. and stated that they wanted to ask the defendant a few questions. When queried by the defendant as to the nature of the questions, the agents stated that they wished to talk about some missing television sets and George McGann. The defendant was given a *Miranda* warning of his constitutional rights and he executed a waiver of rights form. There is some dispute whether the *Miranda* warning was given before or after the announced purpose of the questioning, but in view of our disposition the point is not material. From the defendant's own testimony at the evidentiary hearing, it clearly appears that he was fully advised of his constitutional rights, including the right to appointed counsel and that counsel's *presence* during interrogation. The defendant stated that he understood his constitutional rights as explained, that he was "willing to cooperate with the F.B.I." and that he had "nothing to hide".

The interview of the defendant was conducted at a dining room table in defendant's apartment and lasted approximately one hour. It was during this time that the damaging admission was allegedly made.

We have carefully examined the transcript of the pre-trial hearing and find it totally devoid of any facts or circumstances which would warrant the conclusion, or even the inference, that the defendant's questioning amounted to *custodial interrogation*, triggering the requirement of *Miranda* warnings.

The defendant testified that he answered all questions freely, that he was not placed under arrest nor

told that he would be arrested, and that no charges were pending against him. Bolstering the conclusion that his statement was voluntary was the defendant's subsequent voluntary appearance at F.B.I. offices the afternoon of the same day accompanied by one John Griffin Wright, whom the F.B.I. Agents had earlier inquired about. It seems quite clear that the questioning in the instant case was not accomplished while the defendant was "in custody ... or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 477 (1966). In a case recently decided by this court involving strikingly similar facts, we came to a like conclusion. *United States v. Kershner*, ____ F.2d ____ (5th Cir. 1970) [No. 28443, October 6, 1970]. The record in the case at bar is barren of any facts indicating a coercive or compelling atmosphere, the defendant's conclusions to the contrary notwithstanding. See, *United States v. Hall*, 421 F.2d 540 (2d Cir. 1969), cert. denied, 397 U.S. 990 (1970). Having thus concluded that the circumstances surrounding the defendant's questioning were not such as to require the giving of a *Miranda warning* and the statement made by the defendant was freely given by his own testimony, we need not pass upon the further allegation that defendant's waiver of rights was vitiated by asserted misrepresentations on the part of the F.B.I. Agents.

The alleged error of the trial court in failing to make findings of fact relating to the voluntariness of the defendant's statement is without merit. The undisputed and uncontradicted facts clearly demonstrate voluntariness and that determination is "clearly evident" and "ascertainable" from the record, thereby negating

the necessity of formal findings to that effect. *Jackson v. Denno, supra,* at 378-379; *United States v. Harper,* ____ F.2d ____ (5th Cir. 1970) [No. 29356, September 17, 1970]; *United States v. Feinberg,* 383 F.2d 60 (2d Cir. 1967).

The defendant's further assertion that the wigs introduced into evidence were the fruit of an illegal search and seizure is likewise without merit. At the time the wigs were offered into evidence, defendant's counsel made no objection, nor could such an objection have been sustained for the wigs admitted at trial were not the same wigs which defendant claims were obtained as the result of an illegal search and seizure. The defendant's failure to object while cognizant of this fact is readily understandable.

The defendant lastly complains that it was error for the trial court to allow the government to impeach a material defense witness. Upon cross-examination of defense witness Russell Gilmore, the government attorney asked Gilmore if there was a complaint pending against him in the district court charging him with the same offense for which the defendant was being tried. Gilmore responded affirmatively without objection by defendant's counsel. As such, we may recognize only "plain error" on review. Fed. R. Crim. P. 52(b). Having examined the record thoroughly, we conclude that the question propounded to the witness was proper cross-examination, as the government contends, to show hostility or bias. *United States v. Dardi,* 330 F.2d 316 (2d Cir. 1964), *cert. denied,* 379 U.S. 845.

AFFIRMED.

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United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 408-400 ROYAL ST.
NEW ORLEANS, LA. 70130
(504) 527-6514

January 15, 1971

TO ALL PARTIES LISTED BELOW

Re: No. 28586 - U.S.A. vs. Johnny Ray Littlepage

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By Claudette Staiger
Deputy Clerk

cc: Mr. Melvin Carson Bruder
Messrs. Charles Cabaniss
Andrew Barr

FPI HI—7-15-66-6M-2411

APPENDIX "B"

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 408-400 ROYAL ST.
NEW ORLEANS, LA. 70130

February 5, 1971

Mr. Melvin Carson Bruder
Attorney at Law
706 Main St., Suite 200
Dallas, Texas

RE: NO. 28586 - U.S.A. vs. Johnny Ray Littlepage

Mandate Stayed to 2/14/71.

Dear Sir:

The Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this Court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore, will not be routinely prepared by this office. 38 LW 3502.

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By G. F. Ganucheau
G. F. Ganucheau
Chief Deputy Clerk

/ra
enc.
cc: Mr. Andrew Barr

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28586

D. C. Docket No. CR 3-1455

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHNNY RAY LITTLEPAGE,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas

Before TUTTLE, THORNBERRY and INGRAHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for theNorthern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 22, 1970

Issued As Mandate:

U. S. COURT OF APPEALS
FILED
JAN 15 1971
EDWARD W. WADSWORTH
CLERK

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28586

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHNNY RAY LITTLEPAGE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

(, 19)

ON PETITION FOR REHEARING

Before TUTTLE, THORNBERRY and INGRAHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX "C"

COPY

"IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

UNITED STATES OF AMERICA, Plaintiff	)	
V.	)	CR. NO. 3-1617-C
GOD ALLAHAZAR ALLAH, aka THOMAS WALKER	)	

ORDER TO SUPPRESS

Defendant God Allahazar Allah, also known as Thomas Walker, seeks to have this Court suppress as evidence a 16-guage Savage shotgun, Model No. 220, with a barrel less than eighteen inches in length. He and his co-defendant are charged with possessing said gun in violation of certain specified federal laws.

At a hearing held in this Court on August 14, 1969, the testimony showed that the shotgun in question was removed from the trunk of the vehicle in which Defendant and his co-defendant were found by two two (sic) Dallas policemen who had driven upon the vehicle parked in the middle of a Dallas street. The car's two occupants, the Defendant and another man, were unconscious due to intoxication. They were arrested and charged with being drunk and disorderly. The officers then called for a wrecker to be sent to tow the vehicle to the city pound. Before the wrecker arrived, one of the policemen allegedly pursuant to Police Department instructions began to

search the vehicle "in order to secure the vehicle and all property contained in it." During this procedure the trunk was opened and the shotgun in question was found.

The Government relies on only one case and one proposition in support of its contention that the shotgun was lawfully obtained. That is Harris v. United States, 390 U. S. 234 (1968), which involves the admissibility of an automobile registration card in a robbery conviction. The card was found in the vehicle at the city pound. In order to protect the car from the rain an officer was rolling up the windows and upon opening the door he discovered the card lying "face up on the metal stripping over which the door closes". The Court in the Harris case held:

> "The admissibility of evidence found as a result of a search under police regulation is not presented by this case. * * * (t)he discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody."

The key words in the above holding are "to protect the car". Nothing is said about protecting the property in the car.

The case at bar involves evidence found in the trunk. It is not contended by the Government that this Court fails to see that opening the trunk was a measure "to protect the car". It could only have been done to see what was in the trunk and such a procedure is not condoned by the Harris case.

This Court finds that the shotgun was obtained by a search in violation of the 4th Amendment of the United States Constitution.

It is therefore ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Suppress be and it is hereby granted.

ENTERED this 9th day of September, 1969.

s/ W. M. Taylor, Jr.
UNITED STATES DISTRICT JUDGE"